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In The Supreme Court of the United States

FEBRUARY TERM, 1967

NO. .....

RICHARD HAYES HINTON, PETITIONER

versus

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard Hayes Hinton, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on January 6, 1967.

OPINIONS

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit is unreported and is printed in Appendix A, hereto, infra, page 17. A companion case entitled, "United States of America, Appellee, vs. Buford Wilson Worley and A. C. Bennett, Appellants," was decided by the United States Court of Appeals for the Fourth Circuit on November 3, 1966. The opinion in this case refers to the opinion in United States vs. Worley and Bennett, which latter opinion is also unreported, and is printed herein in Appendix A, infra, page 18. The Journal Entry of the Judgment in the United States Court

for the District of South Carolina, Columbia Division, is printed in Appendix A, hereto, infra, page 20.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 6, 1967, (infra, Appendix A, page 17). The jurisdiction of the Court is invoked under 28 U. S. C., section 1254 (1). An order staying the issuance of a certified copy of the judgment in lieu of a mandate, pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to said United States Court of Appeals, was issued on January 18, 1967, and is printed in Appendix A, hereto, infra, page 21.

QUESTION PRESENTED

ARE TYPEWRITTEN TRANSCRIPTIONS OF RECORDED TELEPHONE CONVERSATIONS ADMISSIBLE IN EVIDENCE OR MAY THEY BE READ TO A JURY IN A CRIMINAL ACTION WHEN THE ORIGINAL RECORDINGS ARE NOT INTRODUCED INTO EVIDENCE BY THE PROSECUTION?

STATEMENT

The petitioner, Richard Hayes Hinton, was indicted on September 20, 1965, in a three count bill of indictment in the District Court of the United States for the District of South Carolina, Columbia Division. The first count in said indictment charged petitioner Hinton and one A. C. Bennett with unlawfully possessing distilled spirits, to-wit; one-half pint of whiskey, the immediate container of which did not have affixed thereto a stamp evidencing payment of the tax imposed on said spirits or compliance with the Internal Revenue Code of 1954, in violation of Title 26, United States Code, section 5604 (a) (1). This charge is alleged to have occurred on or about May 6, 1965. The second count in said indictment charged petitioner Hinton,

and one Buford Wilson Worley, and said A. C. Bennett with unlawfully selling distilled spirits, to-wit; 600 gallons of whiskey, the immediate container of which did not have affixed thereto stamps evidencing payment of the tax imposed on said spirits or compliance with the Internal Revenue Code of 1954, as amended, and said count further charged that said Hinton, Worley and Bennett did aid, abet, and counsel one another in the sale of said distilled spirits, in violation of the Internal Revenue Laws of Title 18, United States Code. The third count contained in said bill of indictment charged petitioner Hinton with unlawfully possessing and transporting distilled spirits, to-wit; 2328 gallons of whiskey, the immediate containers of which did not have affixed thereto a stamp evidencing payment of the tax imposed on said spirits or compliance with the Internal Revenue Code in violation of the United States Code. The charges on the second and third count in said bill of indictment were alleged to have occurred on or about May 11, 1965.

The cases against petitioner Hinton and defendants Worley and Bennett came on for trial before the Honorable Charles E. Simons, Jr., United States District Judge, and a jury, on March 14, 1966, and resulted in a verdict of guilty as to petitioner Richard Hayes Hinton on all counts as charged.

At the trial of these cases the Government offered the testimony of Mr. James Allred who was a special agent of the Alcohol and Tobacco Tax Unit of the United States Treasury Department. Mr. Allred testified that he acted as an undercover agent and assumed the fictitious identity of Jim Hutto and held himself out to be a bootlegger. Contact was allegedly made with Agent Allred in Columbia, South Carolina, by defendant Buford Wilson Worley by telephone from Virginia, at which time Mr. Allred was informed that someone would be down to see

him about the purchase of some liquor. During this telephone conservation defendant Worley described the automobile that the persons who would contact him would be driving as a 1964 maroon Ford with Alabama tags. This telephone conservation was recorded by Agent Allred by holding a microphone of a Tanburg Tape-Recorder to the telephone receiver, without the knowledge or consent of defendant Worley. Subsequently, defendant A. C. Bennett and petitioner Richard Hayes Hinton arrived at a restaurant in Columbia, South Carolina, where an alleged agreement was made by and between James Allred and petitioner Hinton for the sale and purchase of liquor. It was on this occasion that defendant A. C. Bennett allegedly removed a sample one-half pint of liquor from the car in which he and petitioner Richard Hayes Hinton were riding, which car was described as a 1964 maroon Ford with Alabama tags.

Defendant A. C. Bennett and petitioner Richard Hayes Hinton were not arrested at this time.

Mr. Allred further testified as to subsequent telephone conservations between him and petitioner Richard Hayes Hinton, which telephone conversations were also recorded by Mr. Allred in the same manner as the alleged telephone conversations with defendant Worley, and without the knowledge or consent of petitioner Hinton.

Rather than offer into evidence the recorded telephone conservations, the Government, over the objection of the defendants, was allowed to have the typewritten transcript of said alleged telephone conversations read to the jury by Mr. Allred and Assistant United States Attorney Porter. Likewise, over the defendant's objection, the Government was allowed to introduce said typewritten transcriptions of the alleged recorded telephone conversation into evidence. At no time were the recordings, disc, or tapes (or in whatever form said alleged recordings were supposed

to exist) offered or introduced into evidence by the Government, although they were reportedly in the Government's possession.

Objections were promptly interposed by counsel for the petitioner as to the introduction of the alleged conversations between Mr. Allred and the petitioner and between Mr. Allred and defendants Worley and Bennett, but such objections were overruled.

As a result of the procedure followed by the Government in introducing the dialogue of the telephone conversations allegedly recorded, the petitioner was convicted, from which conviction he duly appealed to the United States Court of Appeals for the Fourth Circuit.

The case was argued in the United States Court of Appeals for the Fourth Circuit on December 8, 1966, and the Court handed down its opinion on January 6, 1967, affirming the District Court.

REASONS FOR GRANTING THIS WRIT

We respectfully submit that the decision rendered by the United States Court of Appeals for the Fourth Circuit in the case at bar is in conflict with the decisions of the United States Court of Appeals for the Ninth Circuit in the case of ***Chavez vs. Dickson,*** 220 F. 2nd 727 (9th Cir., 1960) and the United States Court of Appeals for the Third Circuit in the case of ***United States vs. Schanerman*** 150 F. 2d 941 (3rd Cir., 1945), and in conflict with long established rules of evidence.

This conflict of decisions arises by the United States Court of Appeals for the Fourth Circuit holding:

A. That the Government properly introduced into evidence the typewritten transcriptions of the alleged tape-recorded conversations without laying a proper foundation therefore, and

B. That reading said typewritten transcriptions of said

alleged tape-recorded conversations to the jury and introducing said transcriptions into evidence did not violate the best evidence rule.

We deem it appropriate to argue these propositions of law separately, as follows:

A.

THE GOVERNMENT LAID NO FOUNDATION FOR THE INTRODUCTION INTO EVIDENCE OF THE ALLEGED TAPE-RECORDED CONVERSATIONS OR THE TYPEWRITTEN TRANSCRIPTIONS THEREOF.

One of the basic safeguards afforded a citizen upon trial charged with the violation of a Federal Statute, is his right to be confronted with the best evidence available, and his right to require the Government to introduce such best evidence upon foundation properly laid. ***United States vs. Stephenson,*** 121 F. Supp. 275 (D.C.N.Y., 1954); ***United States vs. McKeever,*** 169 F. Supp. 426 (D.C.N.Y., 1958). It is axiomatic that a tape-recorded conversation can in many ways be altered from its original form to the end that the conversation contained thereon will result in an entirely different meaning and context. Such tape may be spliced or re-recorded and portions thereof deleted or added to.

The Courts have taken recognition of the possible misuses of tape-recordings and have set down certain rules to safeguard against such misuses and to protect a defendant from the same. The Court in ***United States vs. McKeever, supra,*** in recognizing the possible danger of an altered tape-recording, states at page 431 of the opinion:

> "The Courts should deal with this class of evidence in a manner that will make available to litigants benefits of this scientific development. **Safeguards against fraud and other abuse are provided by judicial insistence that a proper foundation for such proof be laid."** (Emphasis ours).

It is, therefore, necessary that the Government lay a proper foundation in order to make such tape recording competent as evidence. The foundation required is set forth in the ***United States vs. McKeever, supra,*** where the District Court said at page 430 of the opinion:

"A review of the authorities leads to the conclusion that, before a sound recording is admitted into evidence, a foundation must be established by showing the following facts.

"(1) That the recording device was capable of making the conversations now offered in evidence.

"(2) That the operator of the device was competent to operate the device.

"(3) That the recording is authentic and correct.

"(4) That changes, additions, or deletions have not been made in the recording.

"(5) That the recording has been preserved in a manner that is shown to the Court.

"(6) That the speakers are identified.

"(7) That the conversation elicited was made voluntarily and in good Faith without any kind of inducement.

Relating the foregoing rule to the facts in the case at bar, it will be noted that none of the foregoing required facts were shown by the Government in connection with the alleged tape-recordings of the conversations between Agent Allred and the defendants. The only evidence offered by the Government as to the authenticity and correctness of said conversations was the testimony of Mr. Allred that the typewritten transcriptions admitted into evidence and read to the jury were compared with the recordings and that such transcriptions were the same as the recordings. Nowhere in the record of the case does it appear that the Government offered any evidence whatsoever

that the tape-recordings were true, authentic and correct reproductions of the alleged conversations with the petitioner. It further appears that the only person who compared the transcriptions with the tape-recordings to determine the accuracy and correctness of the same, was the Government's witness, Agent Allred. The District Court did not listen to the tape recordings, and it does not appear that the United States Attorneys made a comparison of the transcriptions and such recordings.

As heretofore submitted, the case of ***Chavez vs. Dickson, supra,*** is in conflict with the decision rendered in the case at bar by the United States Court of Appeals for the Fourth Circuit in that the Court of Appeals for the Ninth Circuit requires the prosecution to lay a proper foundation for the introduction into evidence of tape recordings or transcriptions thereof. In the ***Chavez*** case the District Judge allowed into evidence the transcription of recorded conversations of the defendants, without the introduction of the recordings themselves and without requiring the Government to prove the accuracy and correctness of the recordings and transcriptions. The Circuit Court reversed the District Court and remanded the case for further proceedings. The Court in ruling on this question, stated at page 737 of the opinion:

> "As stated earlier in this opinion, state court rulings on the admissibility of evidence are not subject to review in federal habeas corpus proceedings where no question is presented conserning a federally significant external event. **Here, however, the trial court ruling that the transcribed statements were admissible required that court to adjudicate the facts concerning an external event: the accuracy of the transcriptions.** This external event has federal signifance if the transcriptions were grossly inaccurate, to the substantial prejudice of the appellant. In that event there would,

in our opinion, be a denial of that fundamental fairness in the trial proceedings to which appellants were entitled under the Due Process Clause." (Emphasis ours).

The Court at page 738 of the opinion set forth the proper procedure to be followed, by stating:

"At such further hearing the tape-recordings should be called for and listened to, and the trial court proceedings relative to the use of the transcribed statements should also be examined . . ."

It, therefore, follows that no proper foundation having been laid by the Government for the introduction into evidence of the tape-recordings, the transcriptions of such recordings could command no better position than the tapes themselves.

B.

READING TYPEWRITTEN TRANSCRIPTIONS OF RECORDED TELEPHONE CONVERSATIONS TO THE JURY AND INTRODUCING SAID TRANSCRIPTIONS INTO EVIDENCE VIOLATES THE BEST EVIDENCE RULE.

We respectfully submit, that in the absence of the introduction into evidence of properly authenticated tape-recordings, the introduction into evidence of alleged transcriptions of such recordings flies in the teeth of the best evidence rule and renders such transcriptions inadmissible. We further submit that the burden of proving a case against the defendants rested solely upon the Government and that it is not incumbent upon the defendants themselves to make a comparison of the tape-recordings and the transcriptions or to stipulate as to the authenticity and correctness of such transcriptions.

The authorities upon this principal of law are collected in 58 A. L. R. (2d.) 1024-1052. The District Court for the District of Columbia in discussing the law relative to

a transcription of a recording in the case of ***United States vs. Stephenson, supra,*** at page 279 of the opinion, states:

> "... but from the transcript of the recording in this case, which has been received in evidence on the motion only, the conversations are clearly antiphonal and come within the general rule expressed by Judge Hand (***United States vs. Polakaff,*** 112 F. 2d. 888, 2nd Cir. 1940). In addition, the expert witness testified that there was no physical method by which the record could be deleted or severed, so as to permit playing back only the voice of Parsons. Of course the words uttered by defendant could be deleted from the transcription made from the recording disc, leaving only the words of Parsons for introduction into evidence, **but this would deprive defendant of his right to be confronted by the best evidence, namely, the disc,** which is available in this case. In addition, the evidence shows that more than one transcription has been made from this disc and that they differ in many respects, due no doubt to difficulty in hearing distinctly what the recording reproduced. I know of no way to require defendant to agree in advance as to which, if any, is a correct version, assuming the transcription as secondary evidence could be received under some exception to the best evidence rule." (Insertion and emphasis ours.)

In the case of ***United States vs. Schanerman, supra,*** an opinion of the United States Court of Appeals for the Third Circuit, the jury was allowed to hear "played" recordings of telephone conversations between the defendant and a Government witness; however, the United States Court of Appeals specifically held that transcribed notes made by a stenotype operator from hearing the recordings "played" were properly excluded. We respectfully submit that this decision is in conflict with the opinion rendered

in the case at bar by the United States Court of Appeals for the Fourth Circuit.

The United States Court of Appeals for the Fourth Circuit in the case of ***United States vs. Hall,*** 342 F. 2d. 849 (1965), cited the ***Schanerman*** case, but distinguished the facts in that case with the facts in the ***Hall*** case and did not consider the ***Schanerman*** case to be controlling as applied to the ***Hall*** case. However, the facts of the ***Hall*** case show that the Government introduced into evidence and played to the jury the original wire recording of the conservation and a tape recording made from such original wire recording simultaneously with the use by the jury of a transcription of such recording. Futhermore, the original wire recording and the taped copies thereof were played in the Chambers of the Judge and in the presence of the Counsel for the Government and Counsel for the Defendant, at which time the transcript was compared with the recording from which it was made. It is obvious that the transcription used in the ***Hall*** case was secondary evidence, but was admissible in corroboration of the original recordings. We wish to reiterate, however, that such transcription is secondary evidence and is not competent as substantive evidence as employed in the case at bar.

Such transcription being secondary evidence, the defendants were denied the right by cross-examination to show, if they could, that the transcripts did not accurately represent the alleged conversations between the defendants and Agent Allred, and they have been, thereby, denied a substantial right.

The Oklahoma Supreme Court in the case of ***Bonicelli vs. State,*** 339 P. (2nd) 1063 (1959), aptly applies the best evidence rule to written transcripts of tape-recordings in the following language:

> "The second contention that the admissions of the transcripts of the tape-recorded confession of de-

> fendant, herein before referred to, was reversible error, is highly meritorious . . . Assuming, however, that such predicate had been laid and the recording was otherwise admissible, it would not be improper to play it before the juries. But, to permit written transcripts thereof to be furnished to the jury violated the best evidence rule, since the recording was the best evidence."

In the present case it appears extremely significant that no attempt was made by the United States Attorneys to introduce the original tape-recordings into evidence. In making this observation, no suggestion of impropriety on the part of the United States Attorney's Office is intended by the petitioner. However, by the simple act of laying a proper foundation and offering the original tape-recordings into evidence and playing them, the Court, the jury, the United States Attorneys and the defendants would have had the opportunity of testing their accuracy and correctness, as well as determining the identity of the speakers. In the absence of the introduction of such recordings, it is left to pure conjecture as to whether the prosecution could, in fact, show the facts required in the *McKeever* case and lay a proper foundation for the introduction of the tape recordings and whether the prosecution could produce audible recordings containing evidence competent and material in the case at bar.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitioner has been prejudiced by a conviction upon secondary evidence and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD DUNBAR COOLEY
Courthouse Square

Nashville
North Carolina

VERNON F. DAUGHTRIDGE
P. O. Box 885
Gold Professional Building
Wilson
North Carolina

Counsel for Petitioner